IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
December 1, 2003 Session

JUDITH CHRISTENBERRY v. STANLEY F. TIPTON, ET AL.

Appeal from the Circuit Court for Knox County
No. 1-510-01 Dale C. Workman, Judge

FILED FEBRUARY 20, 2004

No. E2003-01971-COA-R3-CV

This case arises out of an automobile accident. The primary focus of this appeal is on questions pertaining to uninsured motorists ("UM") coverage. At the time of the accident, Judith Christenberry ("the plaintiff") – a single woman – was riding as a backseat passenger in an automobile owned and driven by her friend, the defendant Stanley F. Tipton ("the defendant driver"). The plaintiff sued the defendant driver and "John Doe" – the unidentified motorist who caused the defendant driver to lose control of his vehicle – for damages resulting from serious personal injuries sustained by her in the accident. The plaintiff secured service of process on State Automobile Mutual Insurance Company ("State Auto")[1] seeking UM benefits under a "commercial auto insurance policy" ("the Christenberry policy" or "the policy") issued to Christenberry Trucking and Farm, Inc. ("the Christenberry company") and Clayton V. Christenberry, Jr.,[2] the plaintiff's former husband. State Auto contends that the plaintiff, when riding in a non-covered vehicle, is not an "insured" under the Christenberry policy and, as a consequence of this fact, is not entitled to UM benefits under the policy. State Auto moved for summary judgment as did the defendant driver. The trial court granted both motions. The plaintiff appeals, challenging both rulings. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS and D. MICHAEL SWINEY, JJ., joined.

David L. Buuck, Knoxville, Tennessee, for the appellant, Judith Christenberry.

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[1]Apparently, she also asserted a claim under the uninsured motorists provisions of the defendant driver's automobile insurance policy. While the record appears to be silent regarding this claim, the brief filed by State Auto recites that "[t]he plaintiff made a claim for uninsured benefits under [the defendant driver's] auto policy and that claim has been settled."

[2]Mr. Christenberry is the sole stockholder of the Christenberry company.

J. Gregory O'Connor, Knoxville, Tennessee, for the appellee, State Automobile Mutual Insurance Company.

William Arthur Simms, Knoxville, Tennessee, for the appellee, Stanley F. Tipton.

OPINION

I. *The Accident*

On the day of the accident, the plaintiff and the defendant driver were returning from a pleasure trip to Cherokee, North Carolina; neither party was employed by or acting at the time on behalf of the Christenberry company. The plaintiff was a passenger in the defendant driver's SUV. When the accident occurred, the parties were traveling down the mountain on Newfound Gap Road in the Great Smoky Mountains National Park.

The plaintiff testified that she was asleep in the SUV's back seat when the accident occurred. Because of injuries sustained in the accident by both the plaintiff and the defendant driver, neither has any memory regarding how the accident happened. A witness who was traveling behind the SUV testified that an unidentified motorist, *i.e.*, the defendant John Doe, who was proceeding up the mountain, swerved[3] from his lane into the lane occupied by the SUV, thereby placing his vehicle in front of and facing the SUV. The witness, who was traveling some 30 to 40 feet behind the SUV, stated that the defendant driver was traveling at a speed of approximately 25 mph at the time. According to the witness, when the unidentified motorist crossed over into the SUV's lane, the defendant driver swerved to his left to miss the oncoming vehicle, crossed the lane previously occupied by the unidentified driver, and hit a tree on the other side of the road. The witness stated that "if [the defendant driver] had gone right [instead of left], he would have went [sic] over a huge embankment." The witness testified that she did not observe any improper driving on the part of the defendant driver that caused or contributed to the accident and that she did not know of anything the defendant driver could have done to avoid the accident. The witness related that the John Doe vehicle did not stop.[4] She stated that, when the John Doe vehicle approached the vehicle she was in, the John Doe vehicle "was completely in the middle of the road" and that the driver of her vehicle "went as far to the right without leaving the road as [he] could." She thought the right wheels of her vehicle were over on the shoulder of the road when it came to rest, but she was not sure about this.

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[3]The witness testified that there was a deer near the road which may have distracted the attention of the driver of the John Doe vehicle.

[4]There was no contact between the John Doe vehicle and the vehicle of the defendant driver. *See* Tenn. Code Ann. § 56-7-1201(e)(1)(B) ("the insured shall have no right to recover under the uninsured motorist provision unless: . . . [t]he existence of such unknown motorist is established by clear and convincing evidence, other than any evidence provided by occupants in the insured vehicle"). Here, there is such clear and convincing evidence of the existence of the John Doe vehicle.

The plaintiff sustained serious personal injuries in the accident and incurred substantial medical bills in connection with the treatment of those injuries.

II. *The Plaintiff's Divorce*

Mr. Christenberry and the plaintiff were husband and wife prior to their divorce in 1995. It is undisputed that, after their divorce, they never again lived together and neither thereafter resided in or stayed at the other's residence.

Under the terms of their divorce agreement, Mr. Christenberry was required to provide his former wife with an automobile and pay for insurance on that vehicle. For three years post-divorce, the plaintiff leased a Mazda automobile in her name. Mr. Christenberry complied with the terms of the divorce agreement by paying the monthly lease payments and providing his former wife with insurance coverage.[5] When the lease ended in 1998, the Mazda was purchased by the Christenberry company and title was apparently placed in its name.[6] It is undisputed that the plaintiff continued to have the exclusive use and possession of the vehicle.

III. *The Christenberry Policy*

Following the expiration of the plaintiff's lease, Mr. Christenberry continued to satisfy the terms of his divorce agreement. He included the Mazda as one of 36 specified vehicles expressly "covered" under the terms of the Christenberry policy; however, that policy only reflects the Christenberry company and Mr. Christenberry as *named insured*. The parties agree, and the Christenberry policy in the record reflects, that the plaintiff is not *expressly* named as an insured. However, the declarations pages of the Christenberry policy do name and identify the plaintiff as a

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[5]It is not entirely clear from the record as to how the pre-1998 coverage was provided. Obviously, it makes no difference on this appeal.

[6]The plaintiff tendered the affidavit of Mr. Christenberry in which he stated the following:

> In 1998 the Mazda Millenia was owned by Judy Christenberry. Later in 1998, the company bought the car, however the complete, total and exclusive ownership and use of the car was held by Judy Christenberry.

It is undisputed that, in 1998, the *title* to the Mazda was placed either in the name of Mr. Christenberry or the Christenberry company. We assume it was the latter because it was the Christenberry company that Mr. Christenberry identified as the purchaser; however, a resolution of this factual uncertainty is not material to the issues before us because both of the two possible title owners are shown as the named insured under the Christenberry policy and the Mazda is listed as a covered vehicle in that policy.

The plaintiff contends that, even though the Mazda was titled to another, she, nevertheless, "had the sole and exclusive beneficial use of the car and it was and remains *her* vehicle to this very day." (Emphasis added). Assuming, without deciding, that she was the beneficial owner of the vehicle, State Auto does not make an issue as to the ownership of the Mazda or whether it was covered under the Christenberry policy. Accordingly, the factual dispute as to "ownership" is not a material issue on this appeal.

driver, along with 35 other individuals, including employees of the Christenberry company, Mr. Christenberry, the present Mrs. Christenberry, and others.

The Christenberry policy is identified as a "business auto policy." The names of the 36 "drivers" are reflected on the first two pages of the policy's declarations along with a "driver ID" number,[7] license number, and birth date for each named driver. All of this information is listed below the following language of the Christenberry policy:

> PLEASE REVIEW THIS LIST OF DRIVERS AND NOTIFY YOUR AGENT IMMEDIATELY OF ANY ADDITIONAL DRIVERS OR CORRECTIONS. ALL DRIVERS, BOTH PRINCIPAL AND OCCASIONAL, SHOULD BE LISTED.

(Capitalization in original). The Christenberry policy provides for "uninsured motorists bodily injury" coverage of $1 million for "each accident."

The Christenberry policy defines an "insured" as "any person or organization qualifying as an insured in the Who Is An Insured provision of the applicable coverage." Obviously, "the applicable coverage" in this case is the UM coverage. The relevant provisions of the UM coverage are as follows:

> **TENNESSEE UNINSURED MOTORISTS COVERAGE**
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> * * *
>
> **A. Coverage**
>
> **1.** We will pay all sums the "insured" is legally entitled to recover as compensatory damages from the owner or driver of an "uninsured motor vehicle". The damages must result from "bodily injury" sustained by the "insured", or "property damage" caused by an "accident". The owner's or driver's liability for these damages must result from the ownership, maintenance or use of the "uninsured motor vehicle".
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> * * *
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> **B. Who Is An Insured**
>
> **1.** You.

[7]The numbers are from 1 to 36 in ascending order.

> **2.** If you are an individual, any "family member".
>
> **3.** Anyone else occupying a covered "auto" or a temporary substitute for a covered "auto". The covered "auto" must be out of service because of its breakdown, repair, servicing, loss or destruction.
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> **4.** Anyone for damages he is entitled to recover because of "bodily injury" sustained by another "insured".
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> * * *
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> **F. Additional Definitions**
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> * * *
>
> **2.** The following are added to the **Definitions** Section:
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> **a.** "Family Member" means a person related to you by blood, marriage or adoption, who is a resident of your household, including a ward or foster child.

(Capitalization and bold in original). The business auto coverage form, a part of the Christenberry policy, states that "[t]hroughout this policy the words 'you' and 'your' refer to the Named Insured shown in the Declarations." In this case, there are two "Named Insured" in the declarations pages – the Christenberry company and Mr. Christenberry.

IV. *The Trial Court's Decision*

The defendant driver and State Auto filed motions for summary judgment, which the trial court granted. In its judgment, the trial court specifically found that, under the particular facts of this case, the plaintiff did not have UM coverage under the Christenberry policy issued by State Auto. Pursuant to Tenn. R. Civ. P. 54.02, the trial court entered a final judgment with respect to the plaintiff's claims against State Auto and the defendant driver.[8]

V. *The Issues*

The plaintiff asks us to address four issues. Those issues, as taken verbatim from the plaintiff's brief, are as follows:

[8]The plaintiff's suit against John Doe is still pending.

1. Are there genuine issues of material fact that preclude the trial court from granting summary judgment to plaintiff's uninsured motorist carrier as a matter of law?

2. Did the Honorable Trial Court err in not finding, as a matter of law, that the plaintiff has uninsured motorist coverage afforded her by [State Auto], covering the accident at issue and did the Honorable Trial Judge err in granting Summary Judgment of Dismissal to [State Auto]?

3. Are there genuine issues as to material facts upon the issue of whether State Auto, the uninsured motorist carrier is estopped to deny coverage of the [p]laintiff and did the Honorable Trial Judge err in granting Summary Judgment of Dismissal to [State Auto]?

4. Are there genuine issues of material fact and the inferences which can be drawn from said facts which would preclude the Honorable Trial Court from granting Summary Judgment of Dismissal of Defendant Stanley F. Tipton and did the Honorable Trial Judge err in granting Summary Judgment to Defendant Stanley F. Tipton?

VI. *Standard of Review*

Our standard of review with respect to a grant of summary judgment is *de novo* with no presumption of correctness as to the trial court's judgment. ***Webber v. State Farm Mut. Auto. Ins. Co.***, 49 S.W.3d 265, 269 (Tenn. 2001). Judgment in summary fashion is only appropriate when "both the facts and conclusions to be drawn therefrom permit a reasonable person to reach only one conclusion." ***Id.*** (quoting ***Seavers v. Methodist Med. Ctr. of Oak Ridge***, 9 S.W.3d 86, 91 (Tenn. 1999)). In determining whether summary judgment is appropriate, we "must view the evidence in the light most favorable to the nonmoving party and must also draw all reasonable inferences in the nonmoving party's favor." ***Webber***, 49 S.W.3d at 269 (quoting ***Staples v. CBL & Assoc., Inc.***, 15 S.W.3d 83, 89 (Tenn. 2000)).

VII. *The Grant of Summary Judgment to State Auto*

A.

The analysis used by courts in Tennessee to construe insurance policies is well-settled. ***Tata v. Nichols***, 848 S.W.2d 649, 650 (Tenn. 1993). "Insurance contracts like other contracts should be construed so as to give effect to the intention and express language of the parties." ***Id.*** (quoting ***Blaylock & Brown Constr. Inc. v. AIU Ins. Co.***, 796 S.W.2d 146, 149 (Tenn. Ct. App. 1990)). Courts give the "common and ordinary meaning" to words employed in insurance policies. ***Tata***, 848 S.W.2d at 650. "[The] determination of the intention of the parties is generally treated as a question

of law because the words of the contract are definite and undisputed, and in deciding the legal effect of the words, there is no genuine factual issue left for a jury to decide." ***Planters Gin Co. v. Fed. Compress & Warehouse Co.***, 78 S.W.3d 885, 890 (Tenn. 2002) (citing 5 Joseph M. Perillo, *Corbin on Contracts*, § 24.30 (rev. ed. 1998)). If the impact of an ambiguity as to the legal meaning of a contract is not resolved after the court applies the established rules of construction, that ambiguity then becomes a question of fact for a jury. ***Planters Gin Co***., 78 S.W.3d at 890. When ambiguous language purports to limit coverage under an insurance policy, "that language must be construed against the insurance company and in favor of the insured." ***Tata,*** 848 S.W.2d at 650 (citing ***Allstate Ins. Co. v. Watts***, 811 S.W.2d 883, 886 (Tenn. 1991)).

B.

Under the language of the Christenberry policy, State Auto contracted to provide UM coverage to those who fall within the meaning of the word "insured" as that word is defined in the provisions addressing that coverage. We now turn to those provisions, the pertinent ones of which have been quoted earlier in this opinion.

The UM provisions recite that "You" is an insured. As we have previously noted, "You" is defined in the policy as the "Named Insured shown in the Declarations." At the top of the first page of the seven pages of declarations is a box with the following printing at the top inside of the box:

NAMED INSURED AND ADDRESS

(Capitalization in original). Immediately below this printed material, and within the aforesaid box, is the following:

CHRISTENBERRY TRUCKING
& FARM INC;
CLAYTON CHRISTENBERRY
PO BOX 51445
KNOXVILLE, TN 37950

(Capitalization in original). This is the only place in the declarations that an entity/individual is expressly identified as a *named insured*. As previously indicated in this opinion, our reading of the language convinces us that the only named insured are the Christenberry company and Mr. Christenberry.

In addition to the named insured, the Christenberry policy provides that UM coverage extends to a "family member" of Mr. Christenberry. The plaintiff does not contend that she falls within this category. Therefore, we will not further consider this particular classification.

The Christenberry policy also provides UM coverage to "[a]nyone else" while that person is "occupying a covered 'auto' or a temporary substitute for a covered 'auto.'" While the Mazda

used by the plaintiff is designated as a "covered auto" under the Christenberry policy, it was not being used by the plaintiff at the time of the accident. Furthermore, it is undisputed that the SUV being occupied by the plaintiff at the time of the accident was not being used as a "temporary substitute for a covered 'auto.'" It is further undisputed that the Mazda covered under the policy was fully operational at the time of the accident; the defendant driver and the plaintiff had simply elected to use the former's vehicle for their pleasure trip to Cherokee.

When the pertinent language in the UM coverage provisions is accorded its "common and ordinary meaning," *see* ***Tata***, 848 S.W.2d at 650, it is clear beyond any doubt that the plaintiff does not fit within the definition of an insured under the UM provisions of the Christenberry policy.

C.

While the plaintiff does not expressly acknowledge that she falls outside the ambit of the language of the UM provisions of the Christenberry policy, she does tacitly admit this fact by advancing three theories outside the language of the UM coverage as to why she is entitled to UM coverage. First, she argues that she is an insured under the *liability* feature of the policy and, as a consequence of this fact, entitled to UM coverage. Second, she finds ambiguities in the policy and contends, under ***Allstate Ins. Co. v. Watts***, 811 S.W.2d at 886, that these ambiguities "must be construed against the insurance company and in [her] favor." ***Id***. Finally, she argues that State Auto is estopped to deny UM coverage for her benefit. As to this last point, State Auto contends that estoppel was not raised below, and, therefore, under what all would agree is well-established authority, cannot be raised for the first time on appeal. *See* ***State Dep't. of Human Servs. v. Defriece***, 937 S.W.2d 954 (Tenn. Ct. App. 1996).

1.

The plaintiff contends that she falls within the meaning of the word "insured" as that word is used in the *liability* section of the Christenberry policy. She builds on this premise and argues that Tenn. Code Ann. § 56-7-1201[9] *mandates* that, if a policy provides for UM coverage – as the Christenberry policy does in this case – such coverage *must* be extended, in the words of a case upon

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[9]The portion of Tenn. Code Ann. § 56-7-1201 upon which the plaintiff relies for her "mandate" argument is subsection (a). With the critical language italicized, that subsection provides as follows:

> Every automobile liability insurance policy delivered, issued for delivery or renewed in this state, covering liability arising out of the ownership, maintenance, or use of any motor vehicle designed for use primarily on public roads and registered or principally garaged in this state, shall include uninsured motorist coverage, subject to provisions filed with and approved by the commissioner, *for the protection of persons insured thereunder* who are legally entitled to recover compensatory damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom.

The plaintiff contends that the italicized language refers to those insured for *liability* purposes.

which the plaintiff relies, "to a class of individuals as broad as the class provided with liability coverage under the terms of the automobile insurance policy." ***Aetna Cas. & Sur. Co. v. McMichael***, 906 P.2d 92, 94 (Colo. 1995). Her conclusion from these two premises is that State Auto must provide her UM coverage even if she does not fit within the express language of the UM provisions of the policy. It is her position that the statute requires it. She argues that the UM coverage in this case – which purports to limit coverage to those "*occupying* a covered 'auto'" – is impermissibly more narrow than the liability coverage which extends to those "*using* . . . a covered 'auto.'" (Emphasis added). In other words, she contends that the individuals covered for liability are in the broader category of those who "use" a covered vehicle while the UM language purports to limit coverage to those who "occupy" such a vehicle. It is apparently her theory that one can "use" a vehicle without "occupying" it, *see* generally ***Aetna Cas. & Surety Co. v. McMichael***, 906 P.2d 92 (Colo. 1995), but that "occupancy," by definition, necessarily involves "use."

The plaintiff relies upon the case of ***Dupree v. Doe***, 772 S.W.2d 910 (Tenn. Ct. App. 1988). In that case, we examined an automobile insurance policy issued to an individual. We held, with a minimum of discussion, that the UM coverage provisions in the plaintiff's policy limiting such coverage to "bodily injury [the insured] suffer[s] in a motor vehicle accident *while occupying a motor vehicle or, as a pedestrian*" was not "permissible under the provisions of [Tenn. Code Ann.] § 56-7-1201 or 56-7-1205." ***Id***. (Emphasis in original). In ***Dupree***, the insured was riding his bicycle when he was struck by an unknown and unidentified motorist. ***Id***. He sought to recover under the UM coverage of his policy. ***Id***. On motion of the insurance company, the trial court dismissed the suit, finding that the insured was not entitled to UM coverage since he was not a pedestrian or occupying a motor vehicle at the time of the accident. ***Id***.

In reversing the trial court and remanding for "a trial on its merits," we quoted the following from the Supreme Court's opinion in ***Mullins v. Miller***, 683 S.W.2d 669, 670 (Tenn. 1984):

> [I]t seems to us that the General Assembly has expressed its intention that all damages which can legally be recovered under a liability policy shall also be recoverable under an uninsured motorist policy.

Dupree, 772 S.W.2d at 911. The plaintiff also relies upon the earlier quoted-from case of ***McMichael*** as well as the case of ***Kaysen v. Fed. Ins. Co.***, 268 N.W.2d 920 (Minn. 1978).

We need go no further than the plaintiff's first premise – that she is an insured under the liability coverage of the policy – because we hold that, as an occupant of a non-covered vehicle at the time of the accident, she is *not* an insured for the purpose of liability protection under the policy.

The pertinent provisions of the liability section of the Christenberry policy are as follows:

SECTION II – LIABILITY COVERAGE

> **A. COVERAGE**
> We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto".
>
> * * *
>
> **1. WHO IS AN INSURED**
> The following are "insureds":
> **a.** You for any covered "auto".
> **b.** Anyone else while *using* with your permission a covered "auto" you own, hire or borrow except: [exceptions not applicable in instant case].

(Capitalization and bold in original) (emphasis added).

The plaintiff contends that the pronoun "You" under "WHO IS AN INSURED" "is not defined anywhere either in the liability part or in the UM endorsement." This is true; but this assertion ignores the fact that the "business auto coverage form," which is an integral part of the policy, provides as follows:

> *Throughout this policy* the words "you" and "your" refer to the Named Insured shown in the Declarations.

(Emphasis added). Since the plaintiff is not a "Named Insured shown in the Declarations," it follows that the pronoun "You," as used in the liability section of the policy, does not refer to her. Even if this were not the case and there was some way to include the plaintiff within the definition of "You," the plaintiff would still fall outside the provisions of subsection (a) of "WHO IS AN INSURED" because that section only applies to "You *for any covered 'auto.'*" (Emphasis added). The plaintiff was not in a "covered 'auto'" at the time of the accident in this case.

Moving now to subsection (b) of "WHO IS AN INSURED," we note that the plaintiff does not argue, nor could she argue, that she is included in the remainder of the "WHO IS AN INSURED" language in the liability section. This is for the same reason expressed in the preceding paragraph – at the time of the accident, the plaintiff was not "using . . . a covered 'auto.'"

Despite not fitting within the "WHO IS AN INSURED" language of the liability section of the policy, the plaintiff still contends that she is an "insured" under the liability feature because she is one of 36 individuals listed as "drivers" in the declarations of the Christenberry policy. She asks the following rhetorical question: "Why were 36 individuals named if they were not to be insured?" She responds to her own question by stating those named as "drivers" were listed for the purpose of making them "additional insureds." She states that "there is nothing in the declarations page which

distinguishes [the named drivers] from being insureds." It is obvious that the linchpin of the plaintiff's argument is her theory that, in listing 36 drivers, the parties intended to vest those drivers with all the rights and obligations of those specifically and expressly identified as "insured."

We find no ambiguity in State Auto's *request* that "principal and occasional" drivers be listed in the declarations pages. By the same token, we do not find that an ambiguity is created – with respect to the issues now before us – by the *listing* of 36 drivers including the plaintiff. The only reasonable explanation for the listing is that it reflects the desire of State Auto – probably through its underwriting department – to know the identity of those individuals who the named insured anticipates will be "principal" or "occasional" drivers of covered vehicles. We reject the plaintiff's assertion that the listing of drivers creates an ambiguity and one that must be resolved so as to clothe her with insured status for liability purposes. The Christenberry policy, by its express terms, provides liability coverage to *drivers* only when driving a *covered vehicle*. There is no reasonable basis, in logic or otherwise, to conclude that a listed "driver" is an "insured" other than as expressly provided for in the policy, *i.e.*, "while using with [the Named Insured's] permission a covered 'auto.'"

The plaintiffs in the ***Dupree***, ***McMichael***, and ***Kaysen*** cases were all found to be "insured" for liability purposes under their respective policies. This is the critical distinction between those cases and the instant case and this distinction precludes the plaintiff from arguing the precedential value of those decisions. Since the plaintiff is not an "insured" for liability purposes, she cannot be the beneficiary of a favorable decision from us with respect to the issue now under discussion. In other words, even if she is correct in her legal conclusion that the UM coverage must extend to all those covered for liability coverage, she is not so situated as to take advantage of such a holding. It is not our role to render advisory opinions on hypothetical factual patterns. *See* ***Banks v. Jenkins***, 449 S.W.2d 712, 717 (Tenn. 1969). The resolution of the legal argument posed by the plaintiff must await another day.

2.

In addition to the "ambiguity" mentioned in the preceding section of this opinion, the plaintiff finds ambiguity in the fact that Mr. Christenberry and his present wife are listed as "additional insureds" as to only certain of the 31 covered vehicles. The plaintiff argues that "[l]ogic and common sense would conclude that it was not the intent of the parties to limit the owner [*i.e.*, Mr. Christenberry] to coverage on only 6 of his 31 vehicles."

The plaintiff also finds ambiguity in the fact that the UM endorsement page contained within the policy certified in the record by State Auto has a box for named insureds that is left blank. With respect to the unfilled-in box on the UM endorsement, it seems clear to us that State Auto simply filed a copy of its standard Tennessee UM endorsement pages. There is no contention that this is the actual page from the Christenberry policy.

Even assuming there are some ambiguities in the policy – a position that we are not prepared to adopt – still these ambiguities do not touch upon provisions relied upon by State Auto to deny coverage to the plaintiff. The provisions upon which State Auto relies to deny coverage to the plaintiff compel, without ambiguity, such a result. Accordingly, we reject the plaintiff's "ambiguity" argument as a predicate for affording her UM coverage.

3.

The plaintiff contends that State Auto is not entitled to summary judgment with respect to her charge that State Auto is estopped to deny its obligation to provide the plaintiff UM coverage for the subject accident. In response, State Auto argues that the plaintiff did not raise estoppel below and, therefore, is precluded from doing so for the first time on appeal. *See* ***Defriece***, 937 S.W.2d at 954.

We find no reference, *by name*, to the doctrine of estoppel in any of the pleadings filed by the plaintiff nor do we find any reference to the doctrine in any of the trial court's orders. Furthermore, there is nothing in any of the pleadings filed by State Auto addressing such an argument. However, what we do find in the plaintiff's statement of additional facts are facts, supported by affidavits in the record, that have no bearing on the issues of contract interpretation previously discussed in this opinion. Significantly, however, these facts are clearly relevant to the plaintiff's argument on appeal regarding the doctrine of estoppel. Giving the plaintiff the benefit of the doubt, we conclude that estoppel was raised below.

The operative facts supporting the plaintiff's theory of coverage resulting from estoppel, as set forth in her statement of additional facts, are as follows:

> Dewitt Ingram negotiated the policy of insurance with the agent for State Auto and in said negotiations he made [sic] he told the agent that Ms. Christenberry had to be covered under Clayton Christenberry's divorce decree and that the 1995 Mazda Millenia was for Judy Christenberry's sole and exclusive use and possession and that she was the owner/lessee.
>
> Clayton V. Christenberry, Jr. reviewed the policy when issued and seeing Judy Christenberry's name and her auto as being on the declaration page and that [sic] he relied upon those statements on the declaration page as statement of the full coverage including uninsured motorists coverage for the drivers and autos listed.

(Paragraph numbering and references to affidavits in original omitted). Under the summary judgment analysis, these facts are taken as true. *See* ***Byrd v. Hall***, 847 S.W.2d 208, 215 (Tenn. 1993) ("The evidence offered by the nonmoving party must be taken as true.").

In the seminal case of ***Bill Brown Constr. v. Glen Falls Ins.***, 818 S.W.2d 1 (Tenn. 1991), the Supreme Court concluded that

> an insurer may be estopped to deny coverage for any loss by the misrepresentations of its agent upon which the insured reasonably relies.

Id. at 12. In expounding on its pronouncement, the court stated that it

> reaffirm[ed] the long-standing rule in Tennessee that *any* contractual provision of a policy of insurance, whether part of an insuring, exclusionary, or forfeiture clause, may be waived by the acts, representations, or knowledge of the insurer's agent. Of course, the burden of proof, as in other cases, falls upon the insured to prove that a misrepresentation was made and that the insured reasonably relied upon that misrepresentation.

Id. at 13 (emphasis in original).

We find nothing in the facts established by the affidavits of Dewitt Ingram and Mr. Christenberry to raise a genuine issue of material fact as to whether State Auto's agent misrepresented the coverage in this case. The Ingram affidavit establishes that Mr. Ingram told the agent (1) that, under the Christenberrys' divorce judgment, the plaintiff "had to be covered"; and (2) that the Mazda was "for [her] sole and exclusive use and possession." In fact, the Mazda is a "covered" vehicle under the policy. Likewise, the plaintiff's use of the Mazda is fully covered under the policy, including UM coverage of $1 million for each accident. Mr. Christenberry's affidavit is of no import on the subject of "misrepresentation" because it does not focus on this issue; it only addresses the issue of reliance.

There is nothing in the Ingram affidavit to indicate, in any way, that the agent, expressly or by implication, represented to Mr. Ingram that the plaintiff would be covered for UM protection when riding as a passenger in a non-covered vehicle. There is certainly no evidence that Mr. Ingram expressly asked that the plaintiff be covered when driving or occupying a vehicle other than a covered vehicle. His statement to the agent that she "had to be covered" does not convey such a request.

We find no facts in the record supporting the plaintiff's theory of estoppel.

4.

The three issues raised by the plaintiff with respect to the trial court's grant of summary judgment to State Auto are found to be without merit. State Auto is entitled to summary judgment.

VIII. *The Grant of Summary Judgment to the Defendant Driver*

The plaintiff's final issue is whether the trial court erred in granting summary judgment to the defendant driver. The plaintiff sued him, alleging the following negligence:

> The defendant Stanley F. Tipton was guilty of common law negligence by failing to keep a proper lookout ahead; by failing to keep his vehicle under adequate and proper control; by driving at an excessive speed under the circumstances then existing; and by driving off the roadway striking a tree, thus causing the severe, painful and permanent injuries sustained by the plaintiff.
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> * * *
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> The defendant Stanley F. Tipton was guilty of negligence per se by failing to keep his vehicle under adequate and proper control and as near the right-hand edge of a mountain highway as reasonably possible in violation of the provisions of T.C.A. 58-8-106, specific reference to which is hereby made.

(Numbering in original omitted).

It is undisputed that neither the defendant driver nor the plaintiff has any memory regarding the accident. Furthermore, there is nothing in the record suggesting there is any reason to believe that either will ever have any recall of memory about their ordeal.

The only testimonial evidence before us comes from the witness who was a passenger in the vehicle directly behind the vehicle of the defendant driver. She testified that, at the time of the accident, the defendant driver was proceeding at a speed of approximately 25 mph. According to the witness, when the John Doe vehicle swerved into the defendant driver's lane of traffic, the defendant driver swerved to the left and across the lane previously occupied by the unidentified motorist, rather than swerving to the right and taking the risk of driving "over a huge embankment." The witness testified that she was unaware of what else the defendant driver could have done to avoid the accident. She observed no improper driving on his part.

The defendant driver met his burden by establishing material facts showing he was entitled to a judgment. As a result, the burden shifted to the plaintiff to present evidence "establishing the existence of disputed, material facts." *See* ***Staples***, 15 S.W.3d at 88. In response to the defendant driver's statement of undisputed material facts, the plaintiff simply claimed that a jury could infer, from the photographs of the defendant driver's wrecked vehicle, that he was driving too fast. She also contends that a jury could find negligence on the part of the defendant driver from the fact that he went to his left instead of his right. She points out that the driver of the vehicle in which the

witness was riding was able to pull to the right without going over the embankment and still avoid contact with the John Doe vehicle.

The extensive damage to the vehicle of the defendant driver and the fact that the trailing vehicle was able to stop and avoid colliding with the John Doe vehicle without going to its left proves nothing more than the facts stated. These facts do not prove negligence on the part of the defendant driver; by the same token, they do not give rise to a reasonable inference of negligence on his part.

We are not persuaded by the plaintiff's assertion that a jury could disbelieve the witness's testimony and reject it *in toto*. If this be the case, to what evidence could the jury turn to establish the negligence of the defendant driver? The short and long answer to this question is that there would have been no other evidence, and any verdict of negligence, of necessity, would be the product of pure speculation.

The plaintiff has not presented evidence of any of her allegations of common law negligence or statutory violations as to the defendant driver. We are left with the testimony of the witness in the trailing vehicle. From such evidence, one could only reasonably conclude that the driving of the defendant driver was not negligent in nature.

We conclude that the plaintiff failed to produce "additional evidence showing the existence of a genuine issue for trial." ***Staples***, 15 S.W.3d at 89 n.2 (citations omitted). Viewing the evidence in the light most favorable to the plaintiff, we hold that the trial court did not err in granting summary judgment in favor of the defendant driver.

IX. *Conclusion*

The judgment of the trial court is affirmed. This case is remanded to the trial court for collection of costs assessed below, pursuant to applicable law. Costs on appeal are taxed to the appellant, Judith Christenberry.

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CHARLES D. SUSANO, JR., JUDGE